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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 291.

In the Matter of the Application for Writ of Certiorari.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PETITIONER,

VS.

MACK SAXON, ANCILLARY ADMINISTRATOR AND PERSONAL REPRESENTATIVE IN TEXAS OF THE ESTATE OF J. W. MOORE, DECEASED, RESPONDENT.

BRIEF AND ARGUMENT OF RESPONDENT, RESISTING THE APPLICATION.

WALKER SAULSBURY,
WINBOURN PEARCE,
Attorneys for Respondent.

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To THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The respondent says the petitioner is not entitled to the Writ of Certiorari prayed for for the reasons set out herein.

ARGUMENT AND STATEMENT.

A statement of the case will be found in the opinion of the Supreme Court of Texas on page 112 of the

record. This statement is copied by the Supreme Court from the statement made by the Court of Civil Appeals. There should be added to this statement, however, a further statement made by the Court of Civil Appeals, in the opinion overruling the motion for rehearing, page 92, to the effect that the evidence showed that petitioner's station agent, Mr. Traylor, was an eye witness to the injury and death of deceased; and to the further fact finding of the said Civil Court of Appeals, appearing on page 93 of the record, to the effect that the witness Robinson, after stating that Station Agent Traylor had pointed out the hole in the pathway to him, and, that, after this place had been so pointed out to him by the station agent, he stepped in it to see how much it would give.

The opinion of the Supreme Court of Texas in the case will be found in the record beginning on page 112 and ending on page 116. On motion for rehearing the Supreme Court rendered a further opinion.

The court withdrew the last paragraph of the original opinion and substituted therefor, another paragraph.

As amended and substituted the opinion of the Supreme Court of Texas reads as follows:

> "One J. W. Moore, now deceased, was the head brakeman on a freight train of the defendant railway company, running from a point in New Mexico to another point in the same state. At a place between these two points Moore fell under one of the cars of his train and was instantly killed. Mrs. Bertha Moore, surviving wife of the deceased, qualified as administratrix of deceased's estate in New Mexico, and as such administratrix,

filed this suit for herself and her two minor children for damages growing out of the death of her said husband. Later Mack Saxon, plaintiff in error here, duly qualified as ancillary administrator and personal representative of the deceased's estate and intervened in the suit. Trial was had in the district court before a jury and resulted in a judgment for Saxon in his representative capacity. The railway company duly appealed to the Court of Civil Appeals for the Eighth District at El Paso, which court reversed the judgment of the district court and rendered judgment for the railway company. 21 S. W. (2d) 686. Writ of error was granted to this court on application of Saxon.

We copy the following statement from the opinion of the Court of Civil Appeals:

'Appellee Saxon alleged the death of J. W. Moore, that he was killed at Tolar, New Mexico, while in the discharge of his duties as head brakeman of appellant railway company, without fault on the part of J. W. Moore, deceased; (fol. 146) that appellant was a common carrier engaged in interstate commerce; that the deceased, Moore, received the injuries resulting in his death while in appellant's service handling interstate commerce, and that the injuries to and the death of J. W. Moore, deceased, were proximately caused by the negligence of appellant railway company and assigned several acts of negligence, among them the fast running of the freight train, and rough handling; however, the only one submitted by the trial court to the jury being alleged, substantially, as follows: At said time at the station Tolar, J. W. Moore, the deceased, had thrown the switch, permitting the entrance of said freight train into said side or passing track, and had, with a flag in his hand, as his duty required, proceeded up the main line track for the purpose of flagging an incoming passenger train, and that as the freight train entered onto the side or passing track, and proceeded

to the other end of the track, J. W. Moore, deceased, as required by his duty, crossed over to the side of the freight train for the purpose of boarding the same, and riding to the further end of the side track, in order to be in a better position to discharge the duties required of him with reference to the flagging of said passenger train; that on the side of the passing track or switch track next to the main line, is a well marked and beaten path, wherein brakemen and trainmen in discharge of like duties, traveled. That the deceased, J. W. Moore, in the discharge of his duties, was walking and running in said pathway, and while so engaged, by reason of a large hole or soft place in said pathway was caused to be thrown or fall under said train, and killed.

'The specific negligence assigned is alleged to be in causing or making a hole or depression in the said pathway and maintaining and keeping said hole and depression and soft place in said pathway; and thereby negligence in fail- (fol. 147) ing to furnish deceased a reasonably safe place to work.

'In addition to the general denial, appellant plead, in substance, that deceased, Moore, was an experienced brakeman who knew the location of the tracks and the purpose of the train movement at the time of the accident; that he was familiar with the pathway in question, knew the speed of the passing freight train, and that if he undertook to get on the train on the passing track he did so voluntarily, and merely to serve a purpose of his own; that his duties did not require him on the train at that time, and that none of the other employees expected that he would attempt to get on the train; that his only duty was to remain on the ground and close to the switch after passenger train had passed; that if he put himself in a position of danger, he did so voluntarily. Appellant plead assumed risk and negligence on the part of

the deceased under and in respect to the circumstances and facts as set up.

'The case was submitted to the jury on special issues. After the evidence was heard and before its submission appellant presented its motion for an instructed verdict, which was refused. Appellant's motion for judgment on the answers returned was likewise refused. Judgment was entered for appellee on the answers of the jury on the issues submitted.

'On the issues submitted the jury made the following findings:

'1. At the time and place alleged by plaintiff (appellee) there was a soft area or hole between the tracks of the defendant's lines, as alleged by plaintiff.

'2. The deceased, J. W. Moore, was running along the track, as alleged, and while doing so and attempting to board one of the cars with which he was working he stepped on or upon such soft area or hole and was thereby caused to fall and be injured.

(fol. 148) '3. The presence of such soft area or hole was due to the negligence of the defendant.

'4. Such negligence was a proximate cause of the accident and injury to the deceased, J. W. Moore.

'5. Deceased, J. W. Moore, did not know of such soft area or hole and by the use of ordinary care incident to his employment would not have known it.

'6. The accident or injury to the deceased complained of was not due to some other risks of the employment assumed by the deceased.

'7. States the reasonable compensation appellee is entitled to recover as the damages sustained.

'On the verdict of the jury the court entered judgment for appellee and against appellant for the amount of damages found.'

From the above statement it is evident that plaintiff in error recovered in the trial court on the theory that the deceased, while in the discharge of his duties as a brakeman, was running along by the side of the track of the railway company and while doing so with the purpose and intent of boarding one of the cars in the train, he stepped on or upon some soft area or hole in his pathway, and was thereby caused to fall and be run over and killed. We here call attention to the fact that this action is brought under the Federal Employers' Liability Act, and the rights and obligations of the parties depend upon such act, and the principles of the common law as applied by the courts of the United States. Under such act it is essential that the plaintiff establish negligence on the part of the railway company as the cause of the injury. *Toledo St. L. & W. R. R.* v. *Allen*, 276 U. S. 165.

We are of the opinion that the evidence quoted by the Court of Civil Appeals, and some further facts shown in the record, are sufficient in law to sustain the finding of the (fol. 149) jury as regards the cause and manner of deceased's death. *Davis, Federal Agent*, v. *Preston*, 264 S. W. 331 (Civ. App.), Ld. 16 S. W. (2d) 117 (Sup. Ct.).

As we understand the opinion of the Court of Civil Appeals, that court reverses the judgment of the district court, and renders judgment for the railway company on the theory that there is no evidence in the record sufficient in law to sustain the finding of the jury that the hole or soft place in the place of work was the direct and proximate cause of J. W. Moore's death. The evidence in the record on this question discloses that while in the discharge of his duties, the deceased, who was an experienced brakeman, was running along the pathway beside the track on which his train was

running, and toward the hole or soft place in such pathway; that when last seen he was within a few feet of such soft place or hole; that a short time after the injury a footprint was found in such hole or soft place; that such footprint was going in the same direction as the deceased; that such soft place or hole was directly in the pathway of deceased; that deceased was bound to step in or over such hole or soft place; that the above mentioned footprint was a heavy one, and made by a man running; that the place where deceased fell under the train was about ten feet beyond the hole or soft place, and just about the distance deceased would have fallen if he had stepped in such hole or soft place and stumbled; and that such hole or soft place was the only thing shown which could probably have caused deceased to fall. In this connection we call attention to the fact that one of the witnesses who examined the hole or soft place and himself stepped into it, testified:

'If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble, in my judgment.'

There is a warrant in the evidence for the inference that the deceased intended to get on the train, but we are unable to find any evidence in the record, and none has been pointed out to us, showing that he actually made the attempt; that is, that he actually caught hold of the train. On the other hand, there is circumstantial evidence to, in law, support a fact finding that he was caused to stumble and fall under the train, by stepping into the hole or soft place in the pathway along the side of the track and in which pathway he was running. This issue was fairly presented to the jury and (fol. 158) found as above stated. Nor can it be said that the inference of taking hold of, and falling from the train, was equally as warranted as the finding made by the jury. The evidence places the deceased, when last seen, in the pathway *running* toward the soft place, where the

> footprint was found, and within a few feet of same. It would be a more reasonable inference that the deceased continued in what he was actually doing for the few additional feet necessary to travel, than that he changed his course and took hold of and was thrown from the moving train. Moreover, 'it is presumed that deceased proceeded with due care,' (*A. T. & S. F. Railway Co.* v. *Toops,* 281 U. S. 351), and that he 'did not voluntarily place himself in a position of peril', (*Railway Company* v. *Luten,* 228 S. W. 159, Supreme Court of Texas), which presumption 'is properly to be considered by the jury as a circumstance weighing in favor of the contention of the plaintiffs, and may have been so considered by the jury' (same case last cited)."

It will be seen that the court finds evidence in the case disclosing that the deceased, *while in the discharge of his duties,* was running along the pathway behind the train. The petitioner recites that the deceased had no business on the train and no business by the side of the train, and, in fact, was leaving the place for the discharge of his duties. In making this statement, however, the petitioner disregards all of the testimony except that of the petitioner, and it was discarded by the jury. There is much testimony throughout the statement of facts to support the finding that the deceased had duties to perform on this train, and, in connection with the oncoming passenger train, which made it necessary for him to go about the accomplishment of his duties as he did. All of such testimony will not be copied.

The testimony of the witness Mahall shows that the train, on which the deceased was working, ran into

the switch on short time. We copy as follows from page 38 of the record:

> "That freight train was run into this siding on what is known as short time in railroad language; it was pretty close time. By short time I mean that it was a pretty close margin to give time to clear the switch point for the passing passenger train."

That the deceased was in discharge of his duties, we quote from the testimony of the same witness, record from page 39 to 40.

> "It was Mr. Moore's business to open the switch between the siding and the main line and let the train in on the siding. I didn't see him do that, I couldn't have seen him from the rear. His business was at the front end, and he was there to do his work. After he put the train in on the siding, it would have been his duty to head out the other end when he got ready to go, at the west end of the siding. It would be Mr. Moore's business to throw the switch so as to put the freight train back on the main line. In the ordinary discharge of his work, he would have to be on the engine, I presume, to get to that switch point to open on the main line, that is where I would be to head out. He would have to get back on the train and go toward the front and be there ready to let the train out on the main line. He also had a duty with reference to that passenger train. As to what he would have done, if he had done just what his duty called him to do,—well, he would have to be on the head end, be in a position to flag in case we broke in two or didn't get in the clear in time. He would have to be toward the head, to be as far up the track as he could be when he flagged the passenger train. If he had done his work in the ordinary way that a brakeman should have discharged his work, he would have gotten on that

> train for two reasons, one for the purpose of throwing the switch, to let the train on the main line, and the other for the purpose of being as far up the track as possible in order to flag against the passenger train. * * * I went up to the scene of his death just as soon as we got in the clear. I saw his flag, it was by the side of his body. I picked it up myself. I took it back to the caboose when we left town. That is the flag he would have used in the discharge of his duty to flag the passenger train. His gloves and cap and flag were all close to his body."

An examination of the evidence in the record will substantiate the recitation made by the Supreme Court of Texas with reference to the evidence bearing on the cause of the deceased's fall and death. We judge that it will not be necessary, or even proper, for us to cite the pages of the record. We beg, however, to call attention to one or two of the matters mentioned by the Supreme Court of Texas. In the soft place or hole was found a footprint. This footprint was going in the direction the deceased was running. It was at a place only a few steps from the place where the deceased was last seen running. It was directly in his pathway. The footprint was that of *a running* man, showing that the ball of the foot and the toe had made a deeper imprint than the heel. The petitioner calls attention to the fact that the evidence of one witness disclosed that other people had *walked* around this place that day. This is true. But there is no evidence that anyone was seen running along this place, and no evidence that anyone, recently, had been running across this place. If there had been any running, it probably would have been one of the petitioner's employees, and

it would have been an easy matter for such testimony to be produced.

From the place the deceased was last seen running, by the witness Mahon, to the place he fell under the train was only the distance of ten or fifteen steps. Perhaps ten steps, as a running man steps longer than a walking man. At the time he passed out of sight he was not making any effort, *as if to judge the speed of the train,* or, as if to get on, as he had been doing. Within such short space he would not have had time to get on the train and fall from same between the time he passed from Mr. Mahon's view and the place he was killed.

To our mind a strong circumstance, favorable to the respondent, is, that, after the petitioner's station agent had spoken of and pointed out to the witness Robinson the soft spot or hole, the witness Robinson testified that he went to the hole and stepped in it *to see how much it would give.* The testimony disclosed that the witness Robinson came to the scene a day *after* the happening, and came at the instance of petitioner. He did not testify as to the statement made by the station agent at the time the hole was pointed out to him. But he did testify that after the hole was pointed out by the eyewitness, he went to it and stepped in it to see how much it would give; and found, in his opinion, that there was enough give to cause a man who was not looking, when he stepped in it, to fall.

In connection with the statemen made by the Supreme Court of Texas, to the effect that the presumption that the deceased proceeded with due care, and that he did not voluntarily place himself in a position of peril, it is not amiss to call particular attention to the testimony of the eye witness, Mr. Mahon, detailing

miss to call particular attention to the testimony of the eye witness, Mr. Mahon, detailing what the deceased was doing as he ran along by the side of the train. This testimony disclosed that while the deceased was running by the side of the train, and while he made motions towards the train, both of which indicated that he intended to get on the train, he at no time caught hold of the train or made an actual effort to get on the same. The presumption, sopken of by the Supreme Court of Texas, would certainly warrant the inference that he had not, up to the time of passing out of sight of the eye witness, caught hold of the train or actually attempted to get on the same, for the reason that, due to the speed of the train, such effort on his part would not have been safe. If the deceased had caught the train, he could only have been caused to fall, either because the train was going too fast for the effort, or because he was careless or negligent in making the effort. To presume that he did either would be to presume that he did a negligent act, and, therefore, that he was not in the exercise of ordinary care.